No. 91-265

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

POTOMAC EDISON COMPANY,
Petitioner,

v.

JOE D. HELMICK, TAMMY HELMICK, CARL BELT, INC., and HESTER INDUSTRIES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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RESPONSE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent Hester Industries, Inc. respectfully submits that it supports the position of Petitioner Potomac Edison Company and prays that a writ of certiorari issue to review the opinion of the Supreme Court of Appeals of West Virginia, entered in this matter on June 27, 1991, only as it relates to the matters set forth in Petitioner Potomac Edison's Petition for a Writ of Certiorari. Due to the compelling nature of the issues raised in the Petition for a Writ of Certiorari, Respondent Hester Industries, Inc., supports Petitioner Potomac Edison in its Petition.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia, not yet reported, is reprinted in Petitioner Potomac Edison's Appendix A, at 1a-19a. The Jury Order of the Circuit Court of Hardy County, West Virginia, was entered on July 26, 1989, and is reprinted in Petitioner Potomac Edison's Appendix B at 20a-23a.

STATEMENT OF THE CASE

Petitioner Potomac Edison Company, (hereinafter "Potomac Edison"), is an electric utility that provides service in western Maryland and certain portions of Virginia and West Virginia. Hester Industries, Inc., (hereinafter "Hester"), operates a poultry processing plant in Moorefield, West Virginia. In 1984, Hester was in the process of expanding its Moorefield facilities, and retained the services of a contractor, Carl Belt, Inc., (hereinafter "Carl Belt"), to perform the renovation/construction work at its facility. Carl Belt, Inc. was an independent contractor, and Hester at no time had any control over any of the employees of Carl Belt, Inc.

Hester had contracted with Potomac Edison for additional electrical service. A power pole with electrical apparatus was placed by Potomac Edison on Hester's property. Carl Belt, Inc. discovered that the guy wire attached to the electrical power pole prevented necessary excavation around the pole. Carl Belt employees contacted Potomac Edison requesting that the guy wire be moved, but allegedly Potomac Edison refused their request. Hester was not aware of the need to move the guy wire nor was it privy to any contact between Carl Belt and Potomac Edison.

In order to complete the excavation work for which they were hired, Carl Belt's supervisors decided to remove the guywire. The guywire was removed from the pole and attached to a come-along. This attachment of the guy wire

to the come-along, provided Carl Belt the necessary means to remove the guy wire to excavate around the pole and the guy wire was so removed without incident several times.

On October 24, 1986, while respondent Joe D. Helmick (hereinafter "Helmick"), was assisting in the removal of the guy wire, an uninsulated portion of the slackened wire came into contact with an energized lightning arrester at the top of the utility pole. The guy wire became electrified, and Helmick, who was handling the wire, was electrocuted, suffering severe burns to his left forearm and soles of his feet. Later, Helmick's left arm was amputated at the elbow, as a result of his injuries.

Helmick later filed a claim for benefits with West Virginia Workers' Compensation. On September 8, 1988, Helmick received a workers' compensation award in the amount of Fifty Three Thousand Seven Hundred Sixty Dollars ($53,760.00), predicated upon a sixty percent (60%) permanent partial disability finding. This award was charged against the account of his employer, Carl Belt.

Helmick and his wife brought suit against Potomac Edison and Carl Belt, Inc. in the Circuit Court of Hardy County. Potomac Edison removed the case to United States District Court for the Northern District of West Virginia. Thereafter, Plaintiffs filed a new suit in the Circuit Court of Hardy County adding Hester as a Defendant. Helmick alleged that Potomac Edison negligently designed and constructed the utility pole. West Virginia Code § 23-2-6 provides that employers are immune from suit by an employee, unless the employee can prove that the employer acted with deliberate intent. Helmick alleged that Carl Belt wilfully and intentionally exposed him to danger, under the West Virginia "deliberate intent" statute codified at West Virginia Code § 23-4-2. The claim against Hester was premised only upon the fact that Potomac Edison alleged that Hester

owned the electrical pole, since it was located on Hester property. Potomac Edison filed a cross-claim against Carl Belt for contribution and indemnity and a cross-claim against Hester for contractual indemnity.

Prior to the trial, Helmick dismissed his claim against Carl Belt. At the close of Petitioner's case-in-chief on its cross-claims, the Circuit Court directed a verdict against Potomac Edison on its claim against Carl Belt, and directed a verdict against Potomac Edison on its contractual claim for indemnity against Hester. A special verdict form was prepared for the jury. The jury found Potomac Edison was 40% negligent and Carl Belt 60% negligent. Damages were assessed for Joe Helmick in the amount of $473,232.84 and for Tammy Helmick in the amount of $25,000.00. The jury further found that Hester did not breach Paragraph Fifteenth of its contract with Potomac Edison.

According to West Virginia law under the principles of joint and several liability and workers' compensation immunity for employers from third-party claims for contribution, the entire jury verdict was assessed against Potomac Edison, which including prejudgment interest, totalled Five Hundred Fifteen Thousand Six Hundred Twenty-One Dollars and Eighty-Six Cents ($515,621.86).

Potomac Edison filed post-trial motions seeking modification of the judgment to reduce Potomac Edison's liability to the Helmicks by 60%, proportionate to its percentage of fault as determined by the jury; a set-off of the Helmick verdict that already had been paid by workers' compensation benefits; and entry of a judgment in its favor, or a new trial on its cross-claim for contribution against Carl Belt, which were all denied by the trial court.

On September 18, 1990, the West Virginia Supreme Court of Appeals granted Potomac Edison's Petition for Appeal. Potomac Edison urged the West Virginia Su-

preme Court of Appeals to rewrite the law of contribution and indemnity, arguing that a deprivation of a third party's right to seek contribution and indemnity from a negligent employer protected by the West Virginia Workers' Compensation Act, violated the Fourteenth Amendment to the United States Constitution, as well as the West Virginia Constitution. The West Virginia Supreme Court of Appeals rejected this argument, based upon its recent ruling in *Miller v. Monongahela Power Co.*, —— W. Va. ——, 403 S.E.2d 406 (1991), *cert. pending*, No. 91-146 (July 22, 1991). In *Miller*, the Court held that the combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's rules on joint and several liability; and (3) West Virginia's statutory workers' compensation immunity does not violate federal due process and equal protection principles. In its opinion, the West Virginia Supreme Court noted that although it did concede that Potomac Edison's argument was logical, it was reluctant to overturn one hundred years of West Virginia tort law, 403 S.E.2d at 408 (See Potomac Edison's Appendix A, at 12a). In an opinion dated June 27, 1991, the West Virginia Supreme Court of Appeals affirmed the Trial Court's judgment.

REASON FOR GRANTING THE WRIT

I. THE SYSTEM OF TORT LIABILITY TO COMPENSATE INJURED WORKERS IN WEST VIRGINIA IS VIOLATIVE OF THE FOURTEENTH AMENDMENT PRINCIPLES OF EQUAL PROTECTION AND DUE PROCESS AS APPLIED TO THIRD PARTIES.

The Supreme Court of Appeals of West Virginia has ruled in this case and in *Miller v. Monongahela Power Co.*, —— W. Va.——, 403 S.E.2d 406 (1991), *cert. pending*, No. 91-146 (July 22, 1991), that the combination of West Virginia's system of comparative negligence, West Virginia's rules on joint and several liability and West Virginia's statutory workers' compensation immunity does not violate federal due process and equal protection. These rulings by the Supreme Court of Appeals of West Virginia violate a third-party defendant's rights of due process and equal protection.

In West Virginia, under the decision of *Bowman v. Barnes*, 168 W. Va. 11, 282 S.E.2d 613 (1981), the jury is presented with a special verdict form to assess the comparative fault of a third party defendant and an employer for an injured worker's claim, even though the employer enjoys statutory immunity from liability under the Worker's Compensation Act, West Virginia Code § 23-2-6.[1]

In the instant case, the jury found the employer, Carl Belt, Inc., 60% negligent. The conclusion of the jury, is rendered meaningless because under the principles of

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[1] The only exception to the principle of statutory employer immunity was first recognized by the Supreme Court of Appeals of West Virginia in its decision in *Mandolidis v. Elkins Industries, Inc.*, —— W. Va. ——, 246 S.E.2d 907 (1978), wherein the injured employee was successful in arguing that his employer acted with deliberate intention in exposing him to a known hazard.

joint and several liability the non-employer defendant is held responsible for the entire amount of the verdict. In essence, Potomac Edison is precluded from seeking contribution from Carl Belt, who is more negligent, and Helmick's verdict cannot be reduced to equal Potomac Edison's comparative fault.[2]

The Supreme Court of Appeals of West Virginia has endorsed a system of comparative negligence while adhering to the doctrine of joint and several liability. The result is, that a negligent third party must pay 100% of the verdict, despite the jury's finding that its percentage of comparative fault is much less. Even a 1% negligent party would have to pay all the damages awarded to an injured employee, despite the jury's determination that the employee was 10% negligent and his employer was responsible for the 89% of the total fault. *See, Miller v. Monongahela Power Co., supra.*, 403 S.E.2d at 414. The absurd result unfairly shifts the burden of liability and responsibility for the work related accident from the more culpable employer to the less culpable defendant.

As the development of tort law has vastly increased the injured worker's possible recoveries, there has also been an increasing potential for inequity as between third party and employer. This potential has fostered legislative and judicial involvement in finding an "equitable" compromise. Unfortunately, West Virginia, through its legislation and its decisions of the Supreme Court of Appeals has resolved this inequity in a manner that violates the federal constitutional guarantees of equal protection and due process. There is an overwhelming unfairness in

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[2] The Supreme Court of Appeals of West Virginia has been consistent in its interpretation of the statutory immunity afforded to employers under the Workers' Compensation Act, West Virginia Code § 23-2-6, to preclude actions for contribution by third parties, even though that result was not expressly ordained by the West Virginia legislature. *See, Miller v. Gibson,* —— W. Va. ——, 355 S.E.2d 28, 31-32 (1987).

this resolution by the West Virginia legislature which has been interpreted and implemented by the Supreme Court of Appeals of West Virginia.

The West Virginia Supreme Court of Appeals' decision, in this case, is in direct conflict with the decisions of several other state courts of last resort which have determined that similar aspects of their own systems of tort remedies and liability are violative of the federal constitution guarantees of the Fourteenth Amendment.[3] The judicial determination by the West Virginia Supreme Court of the Workers' Compensation Act, precludes a reduction of a defendant's liability by the certain percentage the employer has been found liable. It has only been recently that the West Virginia system of tort liability modified the allowance to injured workers of duplicate recovery of workers compensation benefits plus any damages awarded at trial or obtained through settlement with an alleged third party tortfeasor.[4] *See National Fruit Product Co. v. Baltimore & Ohio R.R.*, —— W. Va. ——, 329 S.E.2d 125, at 129 n.2.

This Court has established numerous and varied tests to decide whether a particular statute violates the Equal Protection Clause of the Fourteenth Amendment in an attempt to identify guarantees under this Clause. This Court "consistently has required that legislation classify

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[3] There are state court decisions which have followed the West Virginia Supreme Court of Appeals in rejecting the constitutional arguments presented in this case. *Williams v. White Mountain Construction Co.*, 749 P.2d 423 (Colo. 1988); *Tsarnas v. Jones & Laughlin Steel Corp.*, 418 Pa. 513, 412 A.2d 1094 (1980).

[4] West Virginia Code § 23-2A-1, which became effective July 1, 1990, and only applies to claims arising after that date, allows a limited form of subrogation, enabling an employer to recover medical benefits paid under workers' compensation from any proceeds obtained by the employee in a third party action. This amount cannot exceed 50% of the employee's recovery from the third party, net of any attorney's fees and costs.

the person it affects in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). This classification must "rationally advanc[e] a reasonable and identifiable governmental objective." *Id.* at 235. This Court has an obligation to view the classificatory system, in order to determine whether the disparate treatment accorded the affected classes is arbitrary. *Rinaldi v. Yeager*, 384 U.S. 305 (1966). Furthermore, if the classification is not inherently invidious or one that impinges upon a fundamental right, a state statute is to be upheld against equal protection attack, if it is rationally related to the achievement of legitimate governmental ends. *Schweiker v. Wilson*, 450 U.S. at 230.

This Court has stated "that the State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282 (1980). Third party tortfeasors are not a party to the compromise achieved through workers' compensation legislation, wherein employees are given immediate benefits, regardless of fault in exchange for giving up their right to sue their employer. In West Virginia what happens to the third party tortfeasor, in this combination of workers' compensation and tort principles is that it becomes part of the scheme of mutual compromise, by giving up its rights with no gain. It is clear that the West Virginia Supreme Court of Appeals does not acknowledge the teachings of *Martinez* because this is arbitrary and irrational application of the tort system to a third party tortfeasor.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court states: "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty

or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 313. This leads to the inquiry of what is the deprivation of a protected interest, if any, and if there is, what process is due. In this West Virginia tort system, the third party tortfeasor is denied access to the courts because he cannot seek contribution from the more negligent employer, nor is the injured employee's verdict reduced in a proportionate manner to the third party tortfeasor's comparative fault. This is definitely a deprivation of a right without adequate due process.

Although the Supreme Court of Appeals of West Virginia has rejected Petitioner Potomac Edison's Fourteenth Amendment arguments, other state courts of last resort have determined otherwise.

For example, in *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975), the Florida Supreme Court examined the state workers compensation law which gave both the injured employee and his employer the right to sue an alleged third party tortfeasor, "but unequally and unreciprocally the tortfeasor is precluded from suing in turn in a third-party action the employer who may be primarily liable instead of the tortfeasor for the employee's industrial accident." 310 So.2d at 7. The Florida Court concluded that the Worker's Compensation Act singled out only those alleged tortfeasors who had provided goods for services to employers involved in accidents covered by workers' compensation and such a classification was deemed arbitrary in violation of the Fourteenth Amendment's Equal Protection Clause. *Id.* at 8.[5]

The Supreme Court of Minnesota reviewed a provision of that state's worker's compensation law that "the em-

[5] The *Sunspan* decision was recently affirmed by the Florida Supreme Court in *L.M. Duncan & Sons v. City of Clearwater*, 478 So.2d 816 (Fla. 1985).

ployer shall have no liability to reimburse or hold (a third-party tortfeasor harmless on such judgments or settlements (obtained by his employee) in absence of a written agreement to do so executed prior to the injury." *Carson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 at 617 (1974). This provision of the Act was challenged on federal due process grounds by the third party tortfeasor. This legislative decision concerning the common-law right of contribution or indemnity did not pass the due process scrutiny; the Minnesota legislature had proveded no reasonable substitute for the third-party's rights nor was the legislation rationally related to a legitimate state objective. The Minnesota Court therefore held that this provision which gave immunity to employers from third-party contribution claims "violates the due process of the Fifth and Fourteenth Amendment of the United States Constitution . . .,". *Id.* at 620.

In the Ohio intermediate Court of Appeals in *Couch v. Thomas*, 26 Ohio App. 3d 55, 497 N.E.2d 1371 (1985), the Court determined that a co-worker of an injured worker was protected by worker's compensation immunity from a claim for contribution by a third party tortfeasor. However, under the State system of comparative negligence the third-party should be entitled to a jury determination of the co-worker's percentage of fault and should be held liable only for his proportionate share of the total negligence contributing to the injured employee's damages. The Ohio Court found that obligating the third party to pay more than his share would violate his right to due process of law and equal protection under the law.

To be certain, there is a conflict in the law concerning the principles of federal due process and equal protection and their application to worker's compensation law concerning a third party tortfeasor's rights and remedies against a negligent employer. While some courts have rejected the constitutional arguments as has the Supreme Court of Appeals of West Virginia, others have found

these principles to be applicable. Interestingly, some of the courts that have rejected federal constitutional challength to workers' compensation immunity from third party claims for contribution have done so expressly relying on the proposition that the third party would not be subjected to joint and several liability for the employer's proportionate share of the injured party's damages.[6] *See, e.g., Williams v. White Mountain Construction Co.*, 749 P.2d 423, 428-29 (Colo. 1988). Additionally, in some comparative negligence states, the legislature or the courts have required that the immune employer's percentage of negligence be determined by the jury, and the third party's liability to the plaintiff be reduced to reflect only its proportionate share of the total fault, or reduced to reflect benefits received by the injured worker from the employer through worker's compensation benefits. *See, e.g., Runcon v. Shearer Lumber Products, Inc.*, 107 Idaho 389, 690 P.2d 324, 330-31 (1984); *Scales v. St. Louis-San Francisco Ry.*, 2 Kan. App. 2d 491, 582 P.2d 300 (1978); *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (1982); *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E.2d 528 (1983).

In light of the fact that the decisions of the West Virginia Supreme Court of Appeals in this case and other similar cases is in direct conflict with other state courts of last resort reviewing these federal constitutional questions and the significance of the matters concerning the application of federal due process and equal protection principles to the statutory immunity to third party claims for contribution, the decision of the West Virginia Supreme Court of Appeals should be reviewed. For the

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[6] Eight of the forty-five states that have adopted some form of comparative negligence, whether by legislation or judicial decision, have abolished the doctrine of joint and several liability. *See*, V. Schwartz, Comparative Negligence § 16.4 (2d ed. 1986 & 1990 Supp.).

foregoing reasons, Respondent Hester Industries, Inc., submits its Brief in Support of Petitioner's Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia and respectfully requests that Petitioner Potomac Edison's Petition for Writ of Certiorari be granted.

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